IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2008

STATE OF TENNESSEE v. RALPH LEPORE

Direct Appeal from the Circuit Court for Sevier County
No. 9392 O. Duane Slone, Judge

No. E2007-00893-CCA-R3-CD - Filed October 13, 2008

A Sevier County Circuit Court jury convicted the appellant, Ralph LePore, of violating the Sexual Offender Registration and Monitoring Act,[1] and the trial court sentenced him to eleven months, twenty-nine days to be served as one hundred eighty days in confinement and the remainder on supervised probation. On appeal, the appellant contends that at the time he was charged with violating the Act, the Act violated due process because it criminalized behavior outside a registrant's control and violated equal protection because it placed a greater burden on registrants who lived far away from Nashville. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Michaela Burnham, Sevierville, Tennessee, for the appellant, Ralph Lepore.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; James B. Dunn, District Attorney General; and Jeremy Ball and Michelle R. Shirley, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that in 1996, the appellant registered with the sex offender registry as required by the Sexual Offender Registration and Monitoring Act. Pursuant to the Act, the Tennessee Bureau of Investigation (TBI) sent the appellant a monitoring form once every ninety

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[1]The Act is now known as the "Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004." Tenn. Code Ann. § 40-39-201(a).

days, and the appellant was required to return the form to the TBI within ten days. In 2002, the appellant was charged with violating the Act because he returned the form to the TBI outside the ten-day limit.

On October 16, 2003, the appellant filed a motion to dismiss the charge against him, arguing that the Act was unconstitutionally vague, and therefore void, because it was unclear whether the registrant was required to mail the form to the TBI within ten days or the form had to be received by the TBI within ten days. The appellant also claimed that if the TBI had to receive the form within ten days, then the Act violated due process because the registrant had no control over when the United States Postal Service delivered the form to the TBI headquarters in Nashville. At a hearing on the motion, the State argued that the statute was clear and that the form had to be delivered, not mailed, within ten days. The trial court noted that nothing in the statute required a registrant to return the form by mail and agreed with the State that the form had to be delivered to the TBI within ten days. The trial court stated that "it says to be delivered and those are words of ordinary usage and meaning. Delivered is delivered, that means it gets there." The trial court ruled the statute was not vague and denied the appellant's motion to dismiss. The appellant requested a Rule 9 interlocutory appeal, which the trial court granted. This court denied the application on May 25, 2004.

On December 2, 2004, the appellant filed a second motion to dismiss, arguing that the Act violated his constitutional right of equal protection because requiring the form to be delivered to the TBI within ten days "treats those individuals living further away from Nashville . . . differently than those living near Nashville." Nothing in the appellate record indicates that the trial court ruled on the second motion. However, according to the appellant's brief, "counsel's notes show that this [motion] was heard and denied on December 14, 2004."

At the appellant's trial, Chief Deputy Larry McMahan of the Sevier County Sheriff's Department testified that he maintained the sex offender registry and that the appellant first registered as a sex offender on March 11, 1996. In 2002, Deputy McMahan received an affidavit from the TBI, reporting that the appellant had returned his monitoring form to the TBI headquarters in Nashville eight days late. As a result, Deputy McMahan charged the appellant with violating the Sexual Offender Registration and Monitoring Act, and an arrest warrant was issued. He stated that in addition to the violation that resulted in the arrest warrant, the appellant had five prior violations that were not prosecuted. On cross-examination, Deputy McMahan testified that after the appellant's violation, the Act changed so that registrants had to report personally to law enforcement rather than return monitoring forms to the TBI.

Katherine Brewington testified that she was a TBI analyst assigned to the TBI's Sex Offender Unit and was the custodian for the appellant's file. Pursuant to the Sexual Offender Registration and Monitoring Act, the TBI sent the appellant a monitoring form by certified mail four times each year, and he had ten days to sign and return the form to the TBI's Nashville headquarters. In July 2002, the appellant returned his monitoring form to the TBI eight days late. In addition to the July 2002 violation, the appellant had the following prior violations that were not prosecuted: In July 1996, he

returned his monitoring form twenty-seven days late; in January 1999, five days late; in October 2000 and April 2001, the post office returned his forms to the TBI because the appellant did not claim them; and in September 2001, the appellant did not return his form. On cross-examination, Brewington testified that when registrants returned their monitoring forms to the TBI by mail, the envelopes were post-marked by the post office. However, Brewington did not have the envelope in which the appellant mailed his July 2002 monitoring form. The jury convicted the appellant of violating the Act.

II. Analysis

The appellant contends that the Act's requiring registrants to report by mail violated due process because once registrants mailed their monitoring forms, they had no control over when the United States Postal Service delivered the forms to the TBI. Therefore, the Act criminalized behavior outside registrants' control. The appellant also contends that the Act violated equal protection because it placed a greater burden on registrants who lived far away from Nashville and whose forms had farther to travel in order to get to the TBI headquarters within the ten-day time limit. The State argues that the Act did not violate due process by criminalizing behavior outside a registrant's control because the registrant was not required to mail the form to the TBI. The State also argues that the Act did not violate equal protection because it applied equally to all sexual offenders and placed the same burden on every offender. We conclude that the appellant is not entitled to relief.

At the time the appellant was charged with violating the Act, Tennessee Code Annotated section 40-39-104 (repealed 2004) provided as follows:

> At least once every ninety (90) days following receipt of the initial registration/monitoring form pursuant to § 40-39-103, the TBI shall, by certified mail return receipt requested, send a nonforwardable, verification/monitoring form to the registrant's last reported address. The form shall require verification of the continued accuracy of the most recent registration/monitoring form submitted by the sexual offender. Within ten (10) days following receipt of the verification/monitoring form, the registrant shall complete the form and shall cause such form to be delivered to TBI headquarters in Nashville.[2]

"In a prosecution for a violation of this section, in lieu of live testimony the TBI records custodian

[2]Effective August 1, 2004, the new Act provides that "[a]t least once during the months of March, June, September, and December of each calendar year, all violent sexual offenders shall report in person to the designated law enforcement agency to update the offender's fingerprints, palm prints and photograph, as determined necessary by the agency, and to verify the continued accuracy of the information in the TBI registration form." Tenn. Code Ann. § 40-39-204(b).

may, by sworn affidavit, verify that according to such records a sexual offender is in violation of the registration or verification requirements of this chapter." Tenn. Code Ann. § 40-39-108(b) (repealed 2004). The knowing failure to deliver the monitoring form as required was a Class A misdemeanor for the first offense. Tenn. Code Ann. § 40-39-108(a) (repealed 2004).

Regarding the appellant's due process claim, the State contends that the Act did not violate due process by criminalizing behavior outside a registrant's control because the statute did not require the registrant to mail the form. We agree. The statute required that a registrant "cause such form to be delivered" to the TBI. Although registrants obviously had the option of returning the form by mail, returning the form by mail was not a requirement. Registrants could use any medium necessary to return the form as long as the form was delivered to the TBI no more than ten days after the registrant received it.

In support of his argument, the appellant notes that the legislature subsequently changed the Act to require in-person reporting. In 2004, the legislature repealed the Act at issue and enacted the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004, which requires registrants to report in person to a designated law enforcement agency. See Tenn. Code Ann. § 40-39-204(b). We have reviewed the legislative history for both Acts, and our review reveals that the legislature's decision to require in-person reporting had nothing to do with registrants being unable to return their forms to the TBI within the ten-day time limit. Instead, the new Act required in-person reporting because mailing monitoring forms to registrants under the previous Act cost Tennessee citizens approximately eighty thousand dollars per year, and the postal service often returned undeliverable monitoring forms to the TBI because registrants could not be located. See Tenn. G. Assemb., 103rd G.A., 2d Sess. (2004), Judiciary Committee, Senate (Mar. 30, 2004, tape # 2) (statement of District Attorney John Carney).

"Due process requires that a statute provide 'fair warning' and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed." State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citing Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294 (1972)). In the trial court, the appellant argued that the statute was vague because it was unclear as to whether the form had to be received by the TBI within ten days or registrants merely had to mail the form to the TBI within ten days. The trial court concluded that the Act was clear in that it required the appellant actually to deliver the monitoring form to the TBI within ten days. The appellant does not contest that ruling on appeal, and we find no merit to his due process argument.

We note that within his due process claim on appeal, the appellant contends for the first time that the Act's permitting verification of a violation by sworn affidavit in lieu of a TBI custodian's live testimony allowed a conviction based upon hearsay and created an unrebuttable presumption that a registrant knowingly returned the form late. However, the appellant failed to raise either of these arguments in the trial court or in his motion for new trial. Therefore, they are waived. See Tenn. R. App. P. 3(e), 36(a); see also State v. Ira Ishmael Muhammed, No. E2003-01629-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 417, at **52-53 (Knoxville, May 10,

2004). In any event, TBI records custodian Katherine Brewington testified in person about the appellant's violation. Therefore, the appellant is not entitled to relief. See Tenn. R. Crim. P. 52(b).

Regarding the appellant's claim that the Act violated his right to equal protection under the Fourteenth Amendment to the U.S. Constitution, this issue is also waived. The appellant raised the issue in his second motion to dismiss. According to the appellant, a hearing on the motion was held, and the trial court denied the motion. However, no transcript of the hearing or a written order denying the motion is in the appellate record. It is the appellant's duty to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review. See Tenn. R. App. P. 24(a). An incomplete record that does not contain a transcript of the proceedings that are relevant to an issue presented for review precludes this Court from considering the issue. State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990). In any event, a "defendant who alleges an equal protection violation has a burden of proving the existence of purposeful discrimination. A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination had a discriminatory effect on him." State v. Irick, 762 S.W.2d 121, 129 (Tenn. 1988). The appellant has not explained how the Act had a discriminatory effect on him. Moreover, the Act did not violate equal protection because it applied equally to all registrants.

Within his equal protection claim, the appellant argues for the first time that law enforcement's ignoring his prior violations resulted in "arbitrary enforcement" and that "[w]hen the offender's actions, or lack thereof, have resulted in no notice or charges, he may reasonabl[y] believe that he is not in violation of the law." Once again, failure to raise this issue below or in his motion for new trial results in waiver. See Tenn. R. App. P. 3(e), 36(a). Regardless, we find no merit to this claim. "Persons claiming selective enforcement must establish that the law enforcement decision had a discriminatory purpose and produced a discriminatory effect. State v. Harton, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002) (citing United States v. Armstrong, 517 U.S. 456, 465, 116 S. Ct. 1480 (1996)). The decision to enforce a law cannot be based upon arbitrary classifications such as race or religion. Id. The appellant has alleged no such discriminatory enforcement in this case.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE